

DISUNIFORMITY OF FEDERAL CONSTITUTIONAL RIGHTS

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Judge Jeffrey Sutton's 51 Imperfect Solutions describes and celebrates the crucial role of state constitutional law in "making" American constitutional law. The fact that states do not speak with one voice in doing so is, in Sutton's account, a feature rather than a bug. The diversity in their approaches permits experimentation and tailoring, and ultimately produces a stronger and more supple constitutional fabric.

Sutton's enthusiasm for the diversity and dynamism of state constitutional law is infectious. But is the federal alternative quite so flat? Although federal constitutional rights are undoubtedly more uniform than those of states, they are not identical throughout the nation. The application and even definition of federal guarantees varies geographically, sometimes to a surprising degree. Moreover, there are reasons to favor some degree of disuniformity—some of the same reasons, in fact, that Sutton gives for focusing on state constitutional law. But the fact of diversity and the strength of the arguments in favor of it point to a difficult set of questions: how much and what kinds of disuniformity are desirable when it comes to federal constitutional rights? This Essay attempts to sketch a few answers.

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I. INTRODUCTION

Rarely does the title of a book adequately convey its thesis, especially when that thesis is worthy of a book. But in that respect—and in many others—Judge Jeffrey Sutton’s *51 Imperfect Solutions: States and the Making of American Constitutional Law*¹ is exceptional. The title is not only arresting, but invokes many of the themes that Sutton engages and which are central to this Symposium: federalism, diversity, interpretation, and the role of states in a federal constitutional system. Those themes in turn raise hard questions. And Sutton’s central argument is that it is precisely when those questions are hard, and the answers indeterminate, that “it may be more appropriate to tolerate fifty-one imperfect solutions rather than to impose one imperfect solution on the country as a whole, particularly when imperfection may be something we have to live with in a given area.”²

The kinds of thorny and contested questions that often arise in U.S. constitutional law sometimes seem to cry out for a decentralized, entrepreneurial, experimental, and localized approach. That description alone evokes archetypal American virtues of flexibility, competition, and the like. It is also familiar to contrast that approach with a bland, leveling, one-size-fits-all federal alternative—a contrast often drawn, implicitly or explicitly, in scholarship and in political rhetoric alike.³ On the other hand, one might point to the virtues of uniformity, especially with regard to rights,⁴ or the ways in which state and local variation can lead to bad outcomes, especially for minority groups.⁵

Because I agree with Judge Sutton’s positive account of state constitutional law and could add nothing of value to what he has already said in favor of it, I will focus in this Essay on one thing about which we partially disagree. Specifically, I want to focus on the implied comparator in his account: the “one imperfect solution.”

1. JEFFREY S. SUTTON, *51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW* (2018).

2. *Id.* at 19.

3. Over the past few decades, that contrast has usually been associated with those on the political right. See, e.g., *Federalism*, AM. LEGISLATIVE EXCH. COUNCIL, <https://www.alec.org/issue/federalism/> (last visited Aug. 2, 2020) (“Real solutions to America’s challenges can be found in the states—America’s fifty laboratories of democracy—not in one-size fits all federal government policies that disregard regional differences and local community needs.”); Ilya Shapiro, *Federalism Wins Supreme Court Jackpot*, CATO INST. (May 14, 2018, 11:06 AM), <https://www.cato.org/blog/federalism-wins-supreme-court-jackpot> (“It’s insane to think that in a large, pluralistic country like the United States, so many decisions should be made one-size-fits-all in Washington.”). In obvious ways and for obvious reasons, the political battle lines have shifted in recent years.

4. See, e.g., Erwin Chemerinsky, *Two Cheers for State Constitutional Law*, 62 STAN. L. REV. 1695, 1699 (2010) (“[R]elying on state constitutions never will provide more than partial success in advancing liberties and equality because the chance of succeeding in all states, or even most states, is small.”).

5. Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 46 (2010).

Monolithic federal constitutional law is the stalking horse in *51 Imperfect Solutions*. Sutton argues that the U.S. Supreme Court “cannot, or at least should not, premise an interpretation of the National Constitution on the local traditions, cultures, or history of one State, one region of the country, or one group of citizens.”⁶ This descriptive and normative account sets up a sharp contrast with state constitutional law, which of course is more diverse and flexible. (That said, and as the title of the book implies, Sutton does not seek to divide the two entirely—he regards both as part of a common enterprise of “American constitutional law.”⁷)

The basic argument of this Essay is that the contrast is not, and should not be, quite so stark. While federal constitutional rights are undoubtedly and properly *more* uniform than state constitutional rights, our federal constitutional tradition already exhibits some of the kinds of diversity and nonuniformity that Sutton celebrates. Sometimes this is because the federal rules, while applying nationwide in an abstract sense, actually permit (and sometimes demand) attention to local circumstances.⁸ Race-conscious student assignment plans, for example, are uniformly subject to strict scrutiny, but they are constitutional in some parts of the country and not in others.⁹

In other ways, federal constitutional law is quite explicit in defining rights based on “local traditions, cultures, or history.”¹⁰ Obscenity doctrine (which Sutton discusses¹¹) is perhaps the clearest example, given its direct incorporation of “community standards,”¹² which vary significantly. As the Supreme Court put it in *Miller v. California*, “[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.”¹³ But obscenity is not the only example, and the local tailoring is not always simply rhetorical—sometimes federal constitutional rules outright incorporate state and local law. The “property” protected by the Fifth Amendment, for example, is

6. SUTTON, *supra* note 1, at 17–18 (“State courts also have a freer hand in doing something the Supreme Court cannot: allowing local conditions and traditions to affect their interpretation of a constitutional guarantee and the remedies imposed to implement that guarantee.”).

7. *Id.* at 196 (“Why not offer a course on *American* constitutional law, one that covers all facets of the topic?”). One area of possible overlap, which I and others have explored elsewhere, and which Sutton describes in his book, is the degree to which federal constitutional doctrine can and sometimes should incorporate lessons from state constitutional law. Joseph Blocher, *What State Constitutional Law Can Tell Us About the Federal Constitution*, 115 PENN. ST. L. REV. 1035, 1035–36 (2011); Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 366 (2011).

8. See *infra* Section II.A.

9. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (striking down Seattle plan for lack of compelling interest, but recognizing that remedying the effects of past intentional discrimination would be compelling) (citing *Freeman v. Pitts*, 503 U.S. 467, 494 (1992)).

10. See *infra* Section II.B.

11. SUTTON, *supra* note 1, at 18.

12. *Miller v. California*, 413 U.S. 15, 24 (1973).

13. *Id.* at 32; see also *Hoover v. Byrd*, 801 F.2d 740, 742 (5th Cir. 1986) (noting that this test “permit[s] differing levels of obscenity regulation in such diverse communities as Kerrville and Houston, Texas”).

defined in large part by state law, which varies in potentially significant ways from place to place.¹⁴

Finally, there are state and local variations that we might think about as “adjacent” to a federal constitutional right. The federal constitution protects fundamental rights to consensual sex,¹⁵ same-sex marriage,¹⁶ and abortion.¹⁷ But that does not mean that states have identical legal regimes regarding sex (age of consent, for example¹⁸), marriage (cousins, for example¹⁹), or abortion (waiting periods, for example²⁰). Some of these variations can be explained on the basis that, for example, the constitution is silent regarding marriages to double-first cousins,²¹ and so state experimentation²² and variation is to be permitted or even encouraged. But of course, bans on same-sex marriage (or, for that matter, on handguns) did not raise constitutional questions—until they did.²³ The *question* is whether the federal constitution is implicated by such rules, which do after all restrict people’s ability to engage in what otherwise seems to be constitutionally protected conduct.

The point should not be overstated. These could be the exceptions that prove the general rule that—granting that factual differences may dictate different results in different places—federal constitutional rights are, by and large,

14. See *infra* notes 63–65 and accompanying text. As noted below, *infra* note 688 and accompanying text, that variation might not always amount to much in practice. Maureen E. Brady, *Property Convergence in Takings Law*, 46 PEPP. L. REV. 695, 719–23 (2019) (collecting cases); see also Maureen Brady, *The Domino Effect in State Takings Law: A Response to 51 Imperfect Solutions*, 2020 U. ILL. L. REV. 1455.

15. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

16. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).

17. *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992).

18. States vary between sixteen, seventeen, and eighteen as the age of consent, but states also vary as to the allowable age difference between parties under the age of consent. Colorado sets its age of consent at seventeen, but allows someone who is fifteen to have sex with someone who is no more than four years older, and a person who is seventeen can only have sex with someone no more than ten years older. COLO. REV. STAT. § 18-3-402. Hawaii sets its age of consent at sixteen, but allows a five-year age difference for persons aged fourteen or above. HAW. REV. STAT. § 707-730(1)(c)(i) (2019). Idaho sets the age of consent at eighteen, but only considers it statutory rape where the perpetrator is more than three years older than someone who is sixteen or seventeen. IDAHO CODE § 18-6101(2019).

19. Some states allow first cousins to marry. See, e.g., ALASKA STAT. § 25.05.021 (2019) (allowing first cousin marriage). Others void such marriages. See, e.g., S.D. CODIFIED LAWS § 25-1-6 (2019) (voiding marriages between first cousins). And still others take the odd position of allowing first cousin marriages while criminalizing sex between first cousins. See TEX. FAM. CODE ANN. § 6.201 (West 2019) (not voiding first cousin marriages); TEX. PENAL CODE ANN. § 25.02(a)(6) (West 2019) (criminalizing sex between first cousins).

20. Some states, such as California, have no waiting period, while others, like South Dakota, have a 72-hour waiting period and do not allow weekends or holidays to count towards that wait time. CAL. HEALTH & SAFETY CODE §§ 123460 *et seq.* (West 2019); S.D. CODIFIED LAWS § 34-23A-56 (2019).

21. See *infra* note 77. If sisters marry brothers, the offspring are double-first cousins.

22. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”); see also *Arizona v. Evans*, 514 U.S. 1, 8 (1995); *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 292 (1990) (O’Connor, J., concurring); *Chandler v. Florida*, 449 U.S. 560, 579–80, 582 (1981); *Reeves, Inc. v. Stake*, 447 U.S. 429, 441, 446 (1980); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973); *Johnson v. Louisiana*, 406 U.S. 356, 376 (1972) (Powell, J., concurring).

23. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

identically applied across the country. And in the vast run of cases, location probably and properly has little impact on result. The point is emphatically *not* that states or local governments can or should be able to exempt themselves from core constitutional guarantees, but that in some circumstances—particularly at the “margins” of constitutional rights (imagine the double-first cousin case²⁴)—there might be room for variation. My much more limited suggestion is that federal law is not always as uniform as Sutton’s account might indicate.

One way to dissolve this disagreement would be to show that the differences are semantic, or that they ultimately boil down to questions of framing. As Judge Sutton has observed in other contexts, “[l]evel of generality is destiny in interpretive disputes[.]”²⁵ One might say, for example, that courts confronting a due process or takings challenge would apply the same doctrines in North Carolina that they would in Virginia, and the fact that some kinds of property are available in one state and not the other is a distinction without a difference—just a demonstration of the obvious and unremarkable point that application of an identical legal rule to two different factual scenarios could lead to different results. With this, too, I agree in large part. As with nearly any legal debate, the higher one goes up the ladder of abstraction, the more likely one is to find common ground. But relegating differences in state law to the level of fact is not, I think, consistent with Sutton’s project (or mine)—which is to take that law seriously as part of the American constitutional project. If differences in state constitutional law matter—and we emphatically agree that they do—then distinctions in federal law that result from those differences must matter as well.

Moreover, whatever one thinks about the *actual* degree of variation within federal constitutional law, one must confront Sutton’s normative argument that the U.S. Supreme Court not only “cannot” but “should not” tailor constitutional rights at the local level.²⁶ Here too, the case is complicated. Many of the arguments that Sutton makes in favor of the diversity of state constitutional law apply, *mutatis mutandis*, to federal constitutional doctrine.²⁷ It too can be made responsive to state and local identity while also guaranteeing a universal (and nationwide) floor of individual liberty. It might provide (as Sutton says of state constitutional law) “a meaningful source of rights protection, but not a one-size-fits-all source of rights protection,” and “might offer a useful way to handle our country’s differences of opinion and a useful process for ameliorating and eventually resolving them.”²⁸

And yet local tailoring of federal constitutional rights can also impose considerable costs. The federal constitution must surely impose *some* degree of uniformity. It is, at the very least, awkward to have otherwise-identical cases decided differently in different parts of the country. Moreover, for some of the same

24. See *supra* note 21 and accompanying text.

25. Thomas More Law Ctr. v. Obama, 651 F.3d 529, 560 (6th Cir. 2011) (Sutton, J., concurring in part and in the judgment), *abrogated by* Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

26. SUTTON, *supra* note 1, at 18.

27. See, e.g., *id.* at 16–19.

28. *Id.* at ix.

reasons that they may be good laboratories of experimentation, states can be politically and legally volatile—a possibility the Framers suspected²⁹—which has sometimes led to abuse of minority groups.³⁰

This leads to another set of questions, with which this Essay will conclude.³¹ Whether one celebrates variation within state constitutional law (in Sutton's account) or federal constitutional law (in mine), the types and degree of variation must be limited. Not every imaginable variation is a "solution," imperfect or otherwise. Some are simply inconsistent with the American constitutional project. What, then, are the limits? Or, to split the question into two: how much and what kinds of variation are permissible within federal constitutional law?

It is possible to map those questions onto at least three underlying dichotomies³²: between constitutional interpretation and constitutional implementation (or "construction"), between cores and peripheries of rights, and between certainties and ambiguities. In all three of those dichotomies, the argument for variation applies to the second part of the pair—to implementing doctrines, not determining meaning; to tailoring at the peripheries, not altering cores; and to preserving room for development in areas where the answers are unclear.

This short Essay cannot hope to provide even imperfect solutions to these challenges. It will, however, attempt to flesh out the descriptive claim, the normative argument, and the framing question. Descriptively, the claim is that U.S. federal constitutional law *is* disuniform in ways that matter. Normatively, the claim is that this disuniformity has both benefits and costs. And the framework is an initial attempt to get traction on evaluating the kinds and degrees of acceptable variation.

One final word on the framing of the project. Sutton's book directly confronts the deep divisions in American life and politics; it is framed as a partial (and, of course, imperfect) solution to them. This is not a headline-chasing project—he has been pursuing it for decades. But in the past few years, it has been hard not to consider the possibility that the federal fabric itself is coming apart. My minor intervention is an attempt to help preserve it, largely using Sutton's playbook.

29. THE FEDERALIST No. 10, at 84 (James Madison) (Clinton Rossiter ed., Signet 1961) ("The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States.").

30. See, e.g., Gerken, *supra* note 5, at 46; see also *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Shelley v. Kraemer*, 334 U.S. 1, 23 (1948).

31. See *infra* Part IV.

32. This is not an exclusive list; there are other ways to evaluate disuniformity. One might, for example, focus on areas in which norms and rules are in the process of shifting. Or, as Jud Campbell's contribution to this symposium suggests, one might expect (and want) a fair bit of uniformity in the "declaration" of rights—those based on general law—even though, as Campbell notes, the details of implementation vary from place to place. Jud Campbell, *The Realist Transformation of Constitutional Rights*, 2020 U. ILL. L. REV. 1433, 1440.

II. THE FACT OF CONSTITUTIONAL DIVERSITY

The distinction Sutton draws is between fifty-one imperfect solutions on the one hand and a single imperfect one on the other. But is federal constitutional law really so monolithic?

To the degree that the question has surfaced in scholarship and caselaw, it has traditionally been in the midst of debates that constitutional rules might apply differently to different levels of government—federal, state, and local, for example. Some scholars (present company included³³) have argued that even federal constitutional rights can and sometimes should be tailored to sub-national circumstances.³⁴ This would of course entail variation in the application of a federal principle throughout the country. The normative dimension of that debate will be addressed in Part III. The immediate question is how much of a departure it would be from current practice.

Sutton's suggestion is that it would be a big one, since federal constitutional principles not only should not, but *do* not vary from place to place.³⁵ He is in good company. The Supreme Court itself has said as much,³⁶ and (as noted above) the proposition might be unassailably true, depending on the level of generality at which one presents it.

But like other truisms of American constitutional doctrine—that fundamental rights receive strict scrutiny, for example³⁷—the reality is more nuanced. In important ways, federal constitutional law is *not* uniform. The application of constitutional principles can vary considerably depending on where one is located within what John Marshall called our “vast republic, from the St. Croix to the Gulph of Mexico, from the Atlantic to the Pacific.”³⁸

Some of this lumpiness is itself textually specified.³⁹ The Constitution's Seat of Government Clause, to take one obvious example, gives Congress broad power in that particular location.⁴⁰ Likewise, congressional authority under the Territories Clause means that millions of American citizens living in the territo-

33. Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 126 (2013).

34. See generally Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1516 (2005) (noting that “a given constitutional principle may apply differently” to “different levels of government”); Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1813 (2004) (“[T]he predominantly local character of Religion Clause disputes should have theoretical and doctrinal significance.”).

35. SUTTON, *supra* note 1, at 40.

36. E.g., *Benton v. Maryland*, 395 U.S. 784, 795 (1969) (“Once it is decided that a particular Bill of Rights guarantee is ‘fundamental to the American scheme of justice,’ . . . the same constitutional standards apply against both the State and Federal Governments.”) (footnote omitted).

37. Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 227 (2006).

38. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 408 (1819).

39. See generally Allan Erbsen, *Constitutional Spaces*, 95 MINN. L. REV. 1168 (2011).

40. U.S. Const. art. I, § 8, cl. 17.

ries (four million in Puerto Rico alone) face a radically different set of government powers,⁴¹ and are equipped with a very different set of rights.⁴² As Allan Erbsen notes, “[s]patial precision is essential because knowing how the Constitution addresses a particular problem often requires knowing where the problem arises. The text remains the same, but its significance varies as one travels between, for example, Maryland, the District of Columbia, Puerto Rico, Guantánamo Bay, and Afghanistan.”⁴³

Of course, one might concede these examples, or even say—*expressio unius*—that uniformity is the rule unless the text of the Constitution says otherwise. But, as the rest of this Part aims to show, variation is not limited to these pockets of specified governing structures. As Richard Thompson Ford notes, “when the stakes of a jurisdiction are in question . . . one cannot simply refer to lines on a map. . . . [W]e must constantly remind ourselves that *jurisdiction is itself a set of practices*.”⁴⁴ Doing so can help illuminate a wide range of issues, questions, and possibilities about the relationship between law and place.⁴⁵

41. Whether those powers include the authority to expel or “de-annex” Puerto Rico, or to resist a claim to statehood, is an important and difficult question. See, e.g., Joseph Blocher & Mitu Gulati, *Puerto Rico and the Right of Accession*, 43 YALE J. INT’L L. 229, 233 (2018); Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 815 (2005).

42. See, e.g., *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1949 (2016) (denying Puerto Rico access to bankruptcy options that are available to states); *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1868 (2016) (denying double jeopardy claim that would succeed in states); Mitu Gulati & Robert K. Rasmussen, *Puerto Rico and the Netherworld of Sovereign Debt Restructuring*, 91 S. CAL. L. REV. 133, 157 (2017).

43. Erbsen, *supra* note 39, at 1169. Indeed, the fifty existing state constitutions are not the only nonfederal constitutions within the American system. Puerto Rico has a constitution as well, one whose provisions govern 4 million American citizens (more than about half of the states). P.R. CONST. art. 1, §1 (“The political power [of the Commonwealth of Puerto Rico] emanates from the people and shall be exercised in accordance with their will, within the terms of the compact agreed upon between the people of Puerto Rico and the United States of America.”); ROBERT L. TSAI, *AMERICA’S FORGOTTEN CONSTITUTIONS: DEFIANT VISIONS OF POWER AND COMMUNITY* (2014). And, of course, there are subnational constitutions which, for one reason or another, never quite took off. See, e.g., Act of July 3, 1950, Pub. L. No. 81-600, 64 Stat. 319 (codified at 48 U.S.C. §§ 731b-731e (2006)) (providing “for the organization of a constitutional government by the people of Puerto Rico”).

44. Richard Thompson Ford, *Law’s Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843, 856 (1999).

45. For a sampling of scholarship addressing the relationship between place and constitutional principles, see TIMOTHY ZICK, *SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES* (2008); Joseph Blocher, *Selling State Borders*, 162 U. PA. L. REV. 241 (2014); Paul Horwitz, *The Religious Geography of Town of Greece v. Galloway*, 2014 SUP. CT. REV. 243, 295 (2014); Mark D. Rosen, *The Radical Possibility of Limited Community-Based Interpretation of the Constitution*, 43 WM. & MARY L. REV. 927, 930 (2002); Schragger, *supra* note 34; see also Mae Kuykendall, *Restatement of Place*, 79 BROOK. L. REV. 757, 757 (2014) (“Place, as a factor that is present in law but often not fully seen, has not been recognized for its theoretical importance as a viewpoint from which to understand the functioning and implications of many areas of the law.”); Hari M. Osofsky, *A Law and Geography Perspective on the New Haven School*, 32 YALE J. INT’L. 421, 427–34 (2007) (“The above statistics on the marginal status of geography in the United States are the result of an academic murder mystery story: the elimination of U.S. geography departments at many elite universities between 1948 and 1987.”).

A. *Different Results*

Sometimes the application of a single constitutional principle will lead to different results in different places—accepting in one place what elsewhere would be unconstitutional.

Consider what we might think of as remedial variations. Race-conscious student assignment plans might be unconstitutional in Seattle, but constitutional in another city that does have a history of explicit, state-enforced segregation.⁴⁶ Congress’s Section Five power can abrogate state sovereign immunity, but only when it does so in a way that is congruent and proportional to an identified constitutional harm⁴⁷—a recipe for geographic tailoring. Along similar lines, the Supreme Court struck down the coverage formula of the Voting Rights Act precisely because it was not geographically tailored enough.⁴⁸

One might dismiss these as not involving true differences, but simply an application of the same principle—*de jure* segregation can justify affirmative action, for example—leading to different results because of different facts. The prohibition on murder is universal; the fact that some defendants are guilty and some are not is no evidence to the contrary. This leads back to the levels of generality issue, and again I am happy to concede the point. But no matter how one defines it, these results demonstrate that the results of constitutional cases *do* vary based on “the local traditions, cultures, or history of one State, one region of the country, or one group of citizens.”⁴⁹

Such traditions can impact the scope and strength of federal constitutional rights in the other direction as well: by effectively *narrowing* them through deference to particular institutions, whether they be military bases⁵⁰ or universities.⁵¹ These are not precisely geographic distinctions, but they do show variation in federal constitutional rights. Students do not entirely lose their federal constitutional rights “at the schoolhouse gate[.]”⁵² but they do lose *something*. Prisoners retain their fundamental rights to free exercise of religion, free speech, and the like, but those rights have very different contours behind bars.⁵³

46. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007).

47. *City of Boerne v. Flores*, 521 U.S. 507, 522 (1997).

48. *Shelby Cty. v. Holder*, 570 U.S. 529, 529 (2013).

49. SUTTON, *supra* note 1, at 18 (emphasis added).

50. *Greer v. Spock*, 424 U.S. 828, 836–38 (1976).

51. See *Parents Involved*, 551 U.S. at 724; *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003), (invoking and relying on the principle that “universities occupy a special niche in our constitutional tradition”); *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978) (majority opinion of Powell, J.). For a critical account of institutional tailoring in free speech cases, see Scott Moss, *Students and Workers and Prisoners, Oh, My!: A Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine*, 54 UCLA L. Rev. 1635, 1658 (2007). For more sympathetic accounts, see PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* (2012); Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 822 (2008).

52. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”); see also JUSTIN DRIVER, *THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* 426–27 (2018).

53. See, e.g., *Turner v. Safley*, 482 U.S. 78, 99–100 (1987), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. 106-274, 114 Stat. 803.

In these cases, it is not so easy to say that the same principle leads to different results in application, because courts have specifically noted that the standards differ—some rules are constitutional in schools that would not be elsewhere.⁵⁴ Likewise, some constitutional rules are articulated in such a way that differing facts on the ground will lead to different results. The permissibility of time, place, and manner restrictions will vary depending on context.⁵⁵ The fact that a police stop “occurred in a ‘high crime area’ [is] among the relevant contextual considerations in a *Terry* analysis.”⁵⁶ Even the basic structure of strict scrutiny can lead to different results, since different governments have more or less compelling interests in certain regulations.⁵⁷

These contextual constitutional rules permit variation throughout the country, but again one might simply answer that they are pitched at a high level of generality—they are evidence, in other words, of the “federalism discount” that Sutton and others have described.⁵⁸ But in other places, constitutional law is quite specific about variation, not only regarding the facts on the ground, but in terms of legal rules themselves.⁵⁹

B. Different Doctrinal Definitions

Other variations within federal constitutional law depend less on factual distinctions than on definitional ones—not just with regard to the kinds of constitutionally specified distinctions listed above (territories, seat of government, etc.), but also in judge-made doctrines. Specifically, some federal constitutional rules incorporate subnational legal rules that themselves vary, sometimes in significant ways, from place to place.

One obvious example is obscenity doctrine. The first prong of the test for obscenity asks “whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest.”⁶⁰ In applying those community standards, a “juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes.”⁶¹ The result, of course, is that speech that is

54. See *Tinker*, 393 U.S. at 503 n.6.

55. See *Frisby v. Schultz*, 487 U.S. 474, 481 (1988).

56. *Illinois v. Wardlaw*, 528 U.S. 119, 124 (2000) (citing *Adams v. Williams*, 407 U.S. 143, 144, 147–48 (1972)). But see *Virginia v. Moore*, 553 U.S. 164, 172 (2008) (“We thought it obvious that the Fourth Amendment’s meaning did not change with local law enforcement practices . . .”).

57. William P. Marshall, *The Constitutionality of Campaign Finance Regulation: Should Differences in a States’ Political History and Culture Matter?*, 74 MONT. L. REV. 79, 96 (2013) (noting that compelling interest requirement might lead to different results in different states).

58. See, e.g., Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1218 (1978); Jeffrey S. Sutton, *San Antonio Independent School District v. Rodriguez and Its Aftermath*, 94 VA. L. REV. 1963, 1979 (2008).

59. See *Miller v. California*, 413 U.S. 15, 25 (1973).

60. *Id.* at 24 (1973) (citations omitted) (emphasis added).

61. *Hamling v. United States*, 418 U.S. 87, 104 (1974).

constitutionally protected in one area of the country may be unprotected in others.⁶²

The point should not be overstated—the degree to which such variation is desirable, and how much weight it receives in practice, is a matter of considerable debate.⁶³ The point here is simply that, as a matter of definition, the federal constitutional rule incorporates local variation.

Consider another example. The “property” protected by the due process and takings clauses is a product of subnational law. Indeed, the Court has specified that such constitutionally protected entitlements are “not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.”⁶⁴ This can lead to different results in different places. In *Town of Castle Rock, Colorado v. Gonzales*, for example, the Court noted that “in the context of the present case, the central state-law question is whether Colorado law gave respondent a right to police enforcement of the restraining order.”⁶⁵ The Court concluded that it did not.⁶⁶ But in other places, similar claims involving protective orders might succeed.⁶⁷

Again, the degree of resulting variation might be limited in practice, despite the conceptual space left open. Molly Brady has detailed the degree to which courts in takings cases actually tend to treat state property rules as if they emerge from same kind of shared general law.⁶⁸ My modest goal here is to suggest that the law tolerates disuniformity and—even if only in limited ways—sometimes embraces it.

Such diversity can be outcome-determinative in cases where there is “play in the joints” of the federal constitution, as was the case in *Locke v Davey*.⁶⁹ There, the Court rejected a constitutional challenge to a Washington law that denied state funding for vocational training at religious institutions, basing its decision in part on the fact that “the differently worded Washington Constitution draws a more stringent line than that drawn by the United States Constitution.”⁷⁰

62. *Miller*, 413 U.S. at 32 (contrasting “Maine or Mississippi” with “Las Vegas, or New York City”); see also *Hoover v. Byrd*, 801 F.2d 740, 742 (5th Cir. 1986) (noting that this test “permit[s] differing levels of obscenity regulation in such diverse communities as Kerrville and Houston, Texas”).

63. *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 589 (2002) (Breyer, J., concurring in part and concurring in the judgment) (suggesting that standards should be based on the “Nation’s adult community taken as a whole” rather than “geographically separate local areas”).

64. *Paul v. Davis*, 424 U.S. 693, 709 (1976) (quoting *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)).

65. 545 U.S. 748, 757 (2005); see also Blocher, *supra* note 33, at 126 (discussing this example).

66. *Castle Rock*, 545 U.S. at 764–65.

67. See, e.g., *Robinson v. Lioi*, 536 Fed. Appx. 340, 345–47 (4th Cir. 2013) (distinguishing *Castle Rock*).

68. Brady, *Property Convergence in Takings Law*, *supra* note 14, at 705–22.

69. *Locke v. Davey*, 540 U.S. 712, 718–19 (2004).

70. *Id.* at 722–23.

C. Near-Constitutional Distinctions

A final category of constitutional distinctions is somewhat different: it includes variations that are *not* explicitly recognized as such—at least not yet—but which nonetheless shape, sometimes fundamentally, people’s abilities to exercise their fundamental rights.

The federal constitution generally protects the rights of consenting adults to engage in consensual sexual activity⁷¹ and to marry.⁷² But that does not mean that states have identical legal regimes when it comes to what kinds of sex, even between consenting adults, are legally permissible. A handful of states retain the “heartbalm” torts, for example, which subject people to legal sanction for engaging in consensual sexual activity.⁷³

The federal constitution likewise provides the fundamental right to marriage.⁷⁴ But, even after *Obergefell*, states have different rules about precisely who can marry.⁷⁵ In some, first cousins are prohibited from marrying;⁷⁶ in others, first cousins are permitted, but double-first cousins are not.⁷⁷ For that matter, states have different rules about voter registration, voter identification, abortion waiting periods, and a host of other rules that impact people’s ability to exercise their most fundamental constitutional rights.⁷⁸

One might expect, then, a court reviewing one of those laws—a *Lawrence*-based challenge to a heartbalm tort regime, for example, or an *Obergefell*-based challenge to the prohibition on marriage between double first cousins—to invoke the same principle from *Skinner v. Oklahoma*: “We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.”⁷⁹ After all, punishing someone for engaging in sexual activity undoubtedly “involves . . . procreation”; a double-first-cousin ban “involves . . . [m]arriage.”⁸⁰ To the degree that states are permitted to vary along those dimensions, then, we may be seeing variation within federal fundamental rights.

One might remain unconvinced that these examples actually do show a diversity in federal constitutional law. Perhaps all they demonstrate is the unre-

71. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

72. *Obergefell*, 135 S. Ct. at 2604.

73. See H. Hunter Bruton, Note, *The Questionable Constitutionality of Curtailing Cuckolding: Alienation-of-Affection and Criminal-Conversation Torts*, 65 DUKE L.J. 755, 760 (2016).

74. *Obergefell*, 135 S. Ct. at 2604.

75. *Id.*; see, e.g., sources cited *infra* notes 76–77.

76. See, e.g., WYO. STAT. ANN. § 20-2-101(a)(iii) (West 2019); W. VA. CODE ANN. §48-2-302(a) (West 2019).

77. See N.C. GEN. STAT. ANN. § 51-3 (West 2019) (“All marriages between any two persons nearer of kin than first cousins, or between double first cousins . . . shall be void.”).

78. See, e.g., Wendy Underhill, *Voter Identification Requirements: Voter ID Laws*, NCLS (Feb. 24, 2020), <https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx>; GUTTMACHER INSTITUTE, *Counseling and Waiting Periods for Abortion* (Aug. 1, 2020), <https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion>.

79. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

80. See *id.*

markable fact that laws vary from place to place, and that toleration of such diversity—even when those laws have some superficial connection to the exercise of a constitutional right—is itself a demonstration that they do *not* have anything to do with constitutional law. It is like observing that couples seeking to exercise their fundamental right to marry will, in different states, obtain marriage licenses from clerks who themselves will vary in job title, compensation, or even appearance. Sure, they are operating within a kind of constitutional space—the right to marry cannot take place without them—but the existence and extent of these variations is strong evidence that there is *not* a federal constitutional right at play.

It is true that not all differences in state practice necessarily demonstrate variation in federal constitutional rights. Some simply show that states vary in their treatment of those things that lie outside the boundaries of federal constitutional rights. But we should not be too quick to dismiss these variations as *not* involving—to use Sutton’s phrase again—“the making of American constitutional law.”⁸¹ Especially when we think about that law functionally rather than formally,⁸² these kinds of variations have constitutional valence. To define them as non-constitutional precisely because of their diversity is simply to assume an answer about whether federal constitutional law can be diverse.

The point of this Part is relatively straightforward: as a matter of existing doctrine and practice, federal constitutional law varies from place to place. A federal constitutional claim that succeeds in one place might fail in another, thanks to varying facts, varying law, and even varying near-constitutional practices. We should not, therefore, be too quick to think of federal constitutional law as a single, uniform imperfect solution. Whether it *should* be is the next logical question.

III. THE DESIRABILITY OF CONSTITUTIONAL DIVERSITY

It is beyond the scope or ambition of this paper to provide a full-throated defense of variation within federal constitutional rights law. My more limited goal is to survive a scholarly motion to dismiss in making the case that such variation should not be rejected out of hand. It is, to adopt Mark Rosen’s frame in arguing for a different kind of constitutional tailoring, a “surprisingly strong case,”⁸³ albeit a preliminary one.

A. Benefits

The possible benefits of subnational legal approaches are not only considerable, but are in fact too voluminous to discuss in any detail here—nearly any discussion of federalism involves those themes.

81. SUTTON, *supra* note 1.

82. Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 410 (2007) (proposing a functional definition of the American “constitution,” and arguing that it “consists of a much wider range of legal materials than the document ratified in 1789 and its subsequent amendments”).

83. See generally Rosen, *supra* note 34, at 1516 (noting that “a given constitutional principle may apply differently” to “different levels of government[.]”).

It seems straightforward enough, for example, that not all policy questions should be resolved at the federal level. As David Barron notes:

There is a value in ensuring that local jurisdictions have the discretion to make the decisions that their residents wish them to make. The value inheres in the traditional advantages that attend decentralization. These include more participatory and responsive government; more diversity of policy experimentation; more flexibility in responding to changing circumstances; and more diffusion of governmental power, which in turn checks tyranny.⁸⁴

The question then becomes whether those policy differences can or should be refracted in federal constitutional law.

As noted in part above, there are good reasons to accept that they are and should be. The policy-relevant differences in circumstances will almost certainly also be imbricated with the strength of the government's interest in regulation—what is “compelling” in one place might be only “important” in another. Bill Marshall and others have argued as much of campaign finance regulation, for example,⁸⁵ and Christopher Serkin has raised similar points in the takings context.⁸⁶

Sutton's description of *Rodriguez* is good evidence in this regard.⁸⁷ As he notes, Justice Lewis Powell's opinion focused on the challenges of convincing the Court “to define a right and create a remedy that it could apply uniformly to fifty sets of state laws, 248 million people . . . and nearly 16,000 school districts”⁸⁸ Powell noted that school funding depends on “expertise and . . . familiarity with local problems.”⁸⁹ He went on to say: “The very complexity of the problems of financing and managing a statewide public school system suggests that ‘there will be more than one constitutionally permissible method of solving them.’”⁹⁰

These arguments for decentralization need not be naked policy arguments, though—they come clothed in the garb of federalism. Since states are *guaranteed* a constitutional role in our system, they must be given some leeway to determine their own fates, not just collectively, but individually.⁹¹ (That point alone is important: a simple federal v. state divide would suggest a single imperfect solution

84. David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 382 (2001).

85. Marshall, *supra* note 57, at 100 (“The political cultures of the states are different, and applying a one-size-fits-all prescription to the constitutionality of campaign finance rules undercuts both this reality and sound principles and protections of federalism.”); see Justin Weinstein-Tulla, *Election Law Federalism*, 114 MICH. L. REV. 747, 798 (2016).

86. Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. REV. 1624, 1626 (2006) (arguing that “takings by different levels of government implicate different theoretical and doctrinal concerns. The animating intuition is that a different answer to the takings puzzle might apply to federal actions—like wetlands regulation—than to local actions—like a town's denial of a building permit—even if the effect on a particular property owner is substantially the same.”).

87. SUTTON, *supra* note 1, at 35–36.

88. *Id.* at 36.

89. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 41 (1973).

90. *Id.* at 42 (quoting *Jefferson v. Hackney*, 406 U.S. 535, 546–47 (1972)).

91. *See* U.S. CONST. amend. X.

against another single imperfect solution, albeit one with 50 authors.) The commitment need not be deontological; it can also provide utilitarian benefits like experimentation, competition,⁹² preservation of distinct identities,⁹³ and so on.

Such arguments have not always carried the day in constitutional rights law. It has sometimes been argued, for example, that states should receive greater deference than the federal government when their laws are constitutionally challenged.⁹⁴ But as Sutton notes, “the U.S. Supreme Court’s multidecade experiment with dual standards for Bill of Rights guarantees applicable to the state and federal governments did not end well, with the Court ultimately collapsing the two.”⁹⁵ If anything, the difference persists but in the other direction—empirical studies of free speech⁹⁶ and Second Amendment cases⁹⁷ have found that state laws tend to get struck down at *higher* rates than their federal counterparts.

The argument here is different: Not that state governments should, *qua* level of government, get greater deference, but that the constitutional status of a regulation—whether federal, state, or local—should sometimes, and to some degree, be evaluated in terms of local circumstances. This could even help overcome the “federalism discount” that Sutton and others have noted arises in cases where the U.S. Supreme Court ratchets down constitutional protection because it must preserve room for state-level variation.⁹⁸

It should be emphasized that, fundamentally, none of the preceding arguments is original. Even in the narrower category of legal interpretation (as opposed to rulemaking and the like) the benefits of local control have been highlighted in a variety of contexts, including both constitutional⁹⁹ and statutory.¹⁰⁰

92. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 416 (1956) (describing model in which citizen-consumers will move to communities whose bundle of government services they prefer).

93. See generally Ernest A. Young, “The Volk of New Jersey? State Identity, Distinctiveness, and Political Culture in the American Federal System,” (Feb. 26, 2015) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2552866.

94. *Buckley v. Valeo*, 424 U.S. 1, 291 (1976) (Rehnquist, J., concurring in part and dissenting in part) (“[N]ot all of the strictures which the First Amendment imposes upon Congress are carried over against the States by the Fourteenth Amendment.”); *Jacobellis v. Ohio*, 378 U.S. 184, 203–204 (1964) (Harlan, J., dissenting) (obscenity); *Roth v. United States*, 354 U.S. 476, 503–504 (1957) (Harlan, J., concurring in part and dissenting in part) (obscenity); *Beauharnais v. Illinois*, 343 U.S. 250, 294–95 (1952) (Jackson, J., dissenting) (group libel laws).

95. SUTTON, *supra* note 1, at 185 (citing *Mapp v. Ohio*, 367 U.S. 643, 655–57 (1961)).

96. Adam Winkler, *Free Speech Federalism*, 108 MICH. L. REV. 153, 155 (2009) (finding that courts applying strict scrutiny in free speech cases upheld federal speech laws in 56% of cases, state speech laws in 24% of cases, and local speech laws in a remarkably low 3% of cases).

97. Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 DUKE L. J. 1433, 1505 (2018) (finding, based on regression analysis, that “challenges to federal laws, as opposed to state laws, correspond with a 63 percent decrease in the odds of success”).

98. See *supra* note 58 and sources cited therein.

99. See, e.g., Blocher, *supra* note 33, at 127; Wayne A. Logan, *Fourth Amendment Localism*, 93 IND. L.J. 369, 370 (2018).

100. Ethan J. Leib, *Localist Statutory Interpretation*, 161 U. PA. L. REV. 897, 903 (2013) (arguing “[T]he (concededly modest) accountability available for local judicial performance, combined with the possibility for careful state supervision of ‘localist’ judicial action, supports giving local courts more discretion in interpreting both local ordinances and state statutes.”).

Perhaps more to the point, the argument here echoes what Sutton himself says about state constitutional law:

In a country that has come to believe deeply in judicially protected rights but has come to disagree fiercely about which rights to recognize, a renewed focus on state constitutions as a meaningful source of rights protection, but not a one-size-fits-all source of rights protection, might offer a useful way to handle our country's differences of opinion and a useful process for ameliorating and eventually resolving them.¹⁰¹

If federal constitutional law itself were not so one-size-fits-all, then it, too, might contribute to that project.

Quoting again from the book: "Still less is there reason to think that a highly generalized guarantee, such as a prohibition on 'unreasonable' searches, would have just one meaning over a range of differently situated sovereigns."¹⁰² Sutton uses this line in the course of criticizing state courts for interpreting their constitutions in lockstep with the federal constitution.¹⁰³ But might it also be a critique of the federal constitution?

B. Costs

Of course, as with variation in state constitutional law, variation within the federal system also comes with costs and risks. Again, many of them are precisely the same in both contexts.

The Framers themselves recognized that the threat of faction may be more significant at the state level than at the federal level.¹⁰⁴ Deviations from a single nationwide rule could therefore end up denying robust federal constitutional protections to those who need them most—discrete and insular minorities faced with repressive or unresponsive state and local governments, for example. The history of racial discrimination is, here as for other federalism arguments,¹⁰⁵ the most notable ghost.

States were hardly the only bad actors in that story—in fact, at times federal law stood in the way of progressive state-level change¹⁰⁶—and in the present moment, progressives have increasingly taken up the mantles of federalism and

101. SUTTON, *supra* note 1, at ix.

102. *Id.* at 174–75 ("So too of many other generally phrased constitutional guarantees found in the federal and state constitutions: 'due process,' 'equal protection of the laws,' 'cruel and unusual punishment,' 'free speech,' 'free exercise of religion,' and 'takings' of property . . .").

103. SUTTON, *supra* note 1, at 3–4.

104. Madison, *supra* note 29 at 78; see also David J. Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 YALE L.J. 2218, 2220 (2006) ("[T]he standard view is that the higher up one goes, the less passion and the more reason enters into interpretation."); Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1584–85 (1977).

105. Gerken, *supra* note 5, at 46–47 ("The nationalists' objection to conventional federalism typically takes one of two forms. The first is a worry that local power is a threat to minority rights. The second is a related concern about what we might loosely analogize to the principal-agent problem—the fear that state decisions that fly in the face of deeply held national norms will be insulated from reversal. Both find their strongest examples in the tragic history of slavery and Jim Crow.")

106. *Prigg v. Pennsylvania*, 41 U.S. 539, 650 (1842) (finding that federal Fugitive Slave Act preempted Pennsylvania law prohibiting return of escaped slaves).

local control.¹⁰⁷ Some of that is sheer opportunism, of course, as is conservative abandonment of federalism when inconvenient. That is hardly news.

Whatever the partisan vectors, arguing that federalism concerns should shape constitutional rights law does raise a fundamental discomfort. Considering (and criticizing) the Court's refusal to take seriously the argument that states have unique political cultures that may call for different constitutional analysis of campaign finance laws, Bill Marshall nonetheless acknowledges that "it is at least awkward that a provision found constitutional in Montana could be unconstitutional in New York."¹⁰⁸ As explained in Part II, existing doctrine already does this to some degree, and as explained in Part III.A, some scholars and judges have endorsed it.¹⁰⁹

Still, the "awkward" results should not be underestimated, and in some sets of cases they may be too awkward to bear. Consider the subset of federal constitutional cases in which the federal government itself is the defendant. If the results in those cases are allowed to vary across the country, especially assuming the availability of nationwide injunctions,¹¹⁰ the legal system's internal torque would be significant to say the least.

IV. HOW MUCH IS TOO MUCH?

The preceding arguments—one descriptive and one normative—are largely independent. One might deny that federal constitutional law actually is diverse, and yet agree that it should be (or vice versa). But unless one rejects both of the first two arguments entirely, another question arises: How much and in what ways should federal constitutional law depart from uniformity?

This is an impossible question to answer in the abstract. As I have argued elsewhere, the question of whether and how any particular constitutional right should be tailored is ultimately a specific and normative one.¹¹¹ Variation could be justified on the basis of history, policy, culture, or cost-benefit analysis, depending on the right and the various contexts in which it applies. That said, it is possible to identify at least three lenses through which the type and extent of permissible or desirable variation might be identified.

A. Interpretation vs. Implementation

Scholars of constitutional doctrine have often focused on the role it plays in *implementing* constitutional provisions. As Richard Fallon explains, judges "frequently must function as practical lawyers and . . . craft doctrines and tests"

107. Lenny Mendonca & Laura D. Tyson, *The Progressive Resurgence of Federalism*, STAN. SOC. INNOVATION REV.: GOV'T, https://ssir.org/articles/entry/the_progressive_resurgence_of_federalism (last visited Aug. 2, 2020).

108. Marshall, *supra* note 57, at 98–99.

109. See *supra* Section III.A. and accompanying text.

110. See Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 418 (2019); Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920 (2020).

111. Blocher, *supra* note 33, at 88; see also Rosen, *supra* note 34, at 1516–17; Schragger, *supra* note 34, at 1819 n.29.

that are influenced, but not “perfectly determined,” by the meaning of the Constitution.¹¹² That meaning, in turn, is identified through *interpretation*. Some scholars, especially originalists, have posited a difference between interpretation and *construction*, with the former referring to the semantic meaning of a constitutional provision and the latter to the constitutional doctrine that implements it.¹¹³

One way to understand the practice of (and arguments for) variation in federal constitutional law is that it reflects differences in implementation, not in interpretation. After all, the examples are nearly all doctrinal, not derived directly from the text of the document.¹¹⁴ Perhaps the meaning of the Due Process Clause is the same nationwide, but the implementation of that right in judge-made doctrine can and should take account of variations in what counts as property.

My own view is that the distinction here—whether one considers it as being between interpretation and implementation, interpretation and construction, meaning and doctrine—is appealing, though sometimes hard to pin down. It seems intuitively correct that the *meaning* of a federal constitutional right must be nationally uniform, even if that meaning leads to different legal results in different places. Many of the examples discussed in Part II, for example, might be understood as falling within the category of implementation—a uniform guarantee of due process, for example, that cashes out differently depending on background principles of state law.¹¹⁵

The challenge, to return to Judge Sutton’s insight from another context, is the level of generality problem. But the fact that it is hard to draw lines between one level and another does not mean that there are no lines to be drawn, nor that there is no value in saying that the meaning of a constitutional provision is uniform, even as its implementation changes. Again, the statement of Sutton’s with which I am attempting to quibble is that the U.S. Supreme Court “cannot, or at least should not, premise an *interpretation* of the National Constitution on the local traditions, cultures, or history of one State, one region of the country, or one group of citizens.”¹¹⁶ Our disagreement largely dissolves—or at least is reframed in a useful way—if “interpretation” can usefully be separated from “implementation.”

112. RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 4 (2001).

113. See, e.g., Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 99–100 (2010); Keith E. Whittington, *Constructing a New American Constitution*, 27 CONST. COMMENT. 119, 128 (2010).

114. The textually specified variations are of course an exception. See *supra* notes 32–45 and accompanying text.

115. See *supra* Section II.B and accompanying text.

116. SUTTON, *supra* note 1, at 18 (emphasis added).

B. Cores vs. Peripheries

Another way to demarcate the appropriate scope of federal constitutional variation is by limiting it to the *peripheries*, rather than the *cores* of constitutional rights.

Courts and scholars often use spatial metaphors like cores and peripheries when trying to draw lines between various levels of protection.¹¹⁷ In the Second Amendment context, for example, the Court has announced that the “central component” or “core lawful purpose” of the Second Amendment is freedom of self-defense,¹¹⁸ particularly in the home.¹¹⁹ Lower courts have often held that laws burdening that core are subject to a higher level of a scrutiny than those at the periphery—laws regulating public carrying of firearms, for example.¹²⁰

It is at these peripheries and penumbras that the kind of tailoring I describe here tends to operate, and might be most justifiable. No part of the country can or should be allowed to exempt itself from foundational constitutional rules, and perhaps (aside from the kinds of fact-based variation discussed in Part II.A¹²¹), we should be especially wary of deviations in areas where federal doctrine already applies stringent rules: racial discrimination, political speech, and the like. But at the edges, the range of permissive legal interpretations is broader, and the possibilities for variation correspondingly more abundant. As Sutton notes, “[t]he U.S. Constitution and a state constitution may equally value free speech while having different understandings of commercial speech.”¹²² And that makes sense, considering that commercial speech is given less constitutional protection than core political speech.¹²³

Of course, it is not always clear what falls within the core as opposed to the periphery of a constitutional right. The commercial speech example itself is the

117. Cf. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958) (“There must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out.”).

118. *District of Columbia v. Heller*, 554 U.S. 570, 630 (2008); see also *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (“Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller*, we held that individual self-defense is ‘the central component’ of the Second Amendment right.”) (footnote omitted).

119. *Heller*, 554 U.S. at 628, 635; see also Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1282 (2009) (arguing that *Heller*, read alongside other doctrinal sources, establishes that “[t]he individual right to keep and bear arms should extend no further than the front porch”).

120. See, e.g., *United States v. Masciandaro*, 638 F. 3d 458, 470 (4th Cir. 2011) (concluding that restrictions on core Second Amendment rights must satisfy strict scrutiny, while “as we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interest in self-defense”).

121. See *supra* Section II.A.

122. SUTTON, *supra* note 1, at 189.

123. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980). For examples of the scholarly debate, compare C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 IND. L. J. 981 (2009) (arguing against constitutional protection of commercial speech), with Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429 (1971) (arguing for broad protection).

subject of hot dispute, and might not be long-lived.¹²⁴ I have no easy, trans-substantive solution to that question. But it is worth noting that Sutton does indirectly point the way to one partial solution: state constitutional law. Courts in need of guidance about what rights are “core” to a guarantee could well look to state constitutional law for guidance, just as they can and sometimes do when identifying rights that are “deeply rooted” in the American constitutional tradition.¹²⁵

This is part of a broader point about the important ways in which federal constitutional law can and should learn from state constitutional law—a project I have pursued elsewhere.¹²⁶

C. *Certainties vs. Open Questions*

A third way to cabin the breadth and depth of variation in federal constitutional rights law would be to say that it is appropriate only where constitutional answers—“solutions,” in Sutton’s phrase—are uncertain.¹²⁷ In situations where courts are divided about novel questions, the benefits of diverse approaches might be more substantial, or conversely, one might hesitate to embrace a single uniform rule.

In this respect, it might be worth noting that Sutton frames his book as involving “solutions” to “questions.”¹²⁸ To this reader, at least, “solutions” calls to mind a pragmatist approach, one that accommodates the possibility of multiple satisfactory approaches. If instead one thinks of constitutional law as having right answers, then the very notion of “imperfect solutions” is anathema—courts should be correct, not effective.

In general, my own view is similar to the one that Sutton’s choice of words implies: that many constitutional questions—and certainly the ones that most scholars and others have in mind—do *not* have single correct answers. But some do. There is no sense in a geographic diversity of approaches to the question of how old a Senator must be—the text is settled on that question. If and when the law is determinate and settled, uniformity should be the rule (subject, of course, to the fact- and law-based variations discussed in Part II). But where it is not, we might be more inclined to tolerate disuniformity as courts work their way to a single solution. As a matter of legal practice, this could have interesting and potentially significant implications. If, for example, disuniformity were not only acknowledged but also tolerated or even sometimes celebrated, we might think very differently about circuit splits.¹²⁹

124. Baker, *supra* note 123, at 984.

125. Blocher, *supra* note 7, at 366.

126. *Id.* at 367; Blocher, *What State Constitutional Law Can Tell Us*, *supra* note 7.

127. SUTTON, *supra* note 1.

128. *Id.*

129. Cf. Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1567 (2008) (questioning the value of uniformity in interpretation of ambiguous federal statutes, and arguing that the Supreme Court is not well-suited to provide such uniformity in any event).

This point is very similar to, but ultimately distinct from, the point about cores and peripheries. Cores tend to be settled; peripheries tend to involve more open questions. But some issues are settled *as* periphery—the status of commercial speech, for example, is not so much unsettled as it is peripheral. Determining the proper type and degree of variation within federal constitutional rights law will depend on consideration of both characteristics.

V. CONCLUSION

The goals of this short Essay are limited: to describe and provide a *prima facie* defense of some degree of variation within federal constitutional law. As Judge Sutton puts it, “certain constitutional norms are beyond reproach. But even universal truths have local dialects.”¹³⁰ State constitutional law discourse can hopefully be enriched in ways that capture those local dialects, and Sutton’s work will certainly help that linguistic development. But, as he notes, the obstacles are considerable.¹³¹ If those dialects are to be protected and preserved, state constitutional law is not the only option. Federal constitutional law, too, can speak with accents.

130. *Id.* at 189. To be clear, in this passage Judge Sutton is arguing for a richer state constitutional law—a contrast between federal and state constitutional law, as the next sentences make clear: “The U.S. Constitution and a state constitution may equally value free speech while having different understandings of commercial speech. So too of regional understandings of privacy, education, speech, and family structures that stem from sources different from the text of the Federal Constitution.” SUTTON, *supra* note 1, at 189; *see also* Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1148 (1993) (explaining that state courts should be viewed as having “the authority to put into place, within [each] community, [their] unique interpretation [of a] common object”). My point is only that those same “regional differences” can be, and sometimes are, refracted in federal constitutional law as well.

131. SUTTON, *supra* note 1, at 190.